Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term

No. 77-67

WILLIAM ROBINSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

WILLIAM ROBINSON,

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UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 23, 1977.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of petitioner for distribution and possession of a controlled substance; possession with intent to distribute, 21 U.S.C. §841; conspiracy to manufacture a controlled substance, U.S.C. §846; aiding and abetting, U.S.C. §2. Petitioner was tried in the District Court by a jury and there is no opinion of that Court. The Third Circuit filed no opinion but merely confirmed the judgment of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on the 23rd of June, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is it not a violation of the Fifth Amendment for the Government Prosecutor to state six (6) times, to the jury, that the testimony of the Government is uncontradicted, when the petitioner did not testify?

2. Is it not a violation of due process where the prosecutor charged counsel for the petitioner, of throwing a tricky question to a Government witness?

3. Is it not a violation of due process where the trial judge refuses to charge that a plea of not guilty denies all the charges?

4. Is it not a violation of due process where the trial judge refuses to strike out certain exhibits, which the Government's own testimony indicated they were destroyed?

5. Is it not a violation of due process permitting the testimony of a young witness, who showed no comprehension of the purpose of an oath?

6. Is it not a violation of due process where the Court refuses to allow counsel to argue that one of the co-conspirators had been granted a motion for judgment of acquittal, the refusal to grant a motion judgment of acquittal, the refusal to consider possible prejudices because of newspaper publicity?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

. . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

The Government's case consisted of the alleged operations of William Robinson, the petitioner and other defendants of manufacturing amphetamines. They were charged with conspiracy and possession; manufacture with intent to deliver. The Government endeavored to prove that the original process of manufacture was in a barn in Trevose, Bucks County, Pennsylvania, and the operation was then moved to Main Street in Philadelphia, Pennsylvania.

The Government also proved that the manufactured product was sold to individuals but failed to prove that the sale of the product contained amphetamine. No amphetamine was found in the possession of any of the defendants during the alleged conspiracy.

Almost a year, after termination of the conspiracy, one of the defendants, Mayer, was granted immunity and he told Government Agent Miller about the involvement of all the defendants during the term of the alleged conspiracy. William Robinson did not come into the conspiracy until a year later when his son, who was also a member of the conspiracy, took sick.

A mirror was given to Agent Miller by Mayer and this was subsequently found to contain traces of amphetamine. The chemist was also permitted, over objection, to testify that chemicals found in the barn at Trevose, sixteen months after one of the defendants abandoned same, and a tenant produced by the Government, testified that he destroyed everything prior to the agent's alleged finding that bottles and jars containing traces of amphetamine were found. (Perjury?)

Mayer testified that he would not swear as to what was being manufactured although he testified to a few sales, the contents of which he did not know.

Character testimony was presented on behalf of William Robinson. John Drum was acquitted by the jury. Joseph Gentile was acquitted by the Court following a motion for a judgment of acquittal. Stanley Palmer was convicted on a conspiracy count

only and the balance of the defendants were convicted of all the charges.

A motion for a new trial and judgment of acquittal, on behalf of William Robinson was denied by the Court on January 13, 1977, and on January 20, 1977, the Court sentenced William Robinson to a term of imprisonment for three (3) years plus three (3) years parole.

REASONS FOR GRANTING THE WRIT

I.

The Government's arguments were prejudicial. There is a diversity among all the Circuits as to the use of the words "uncontradicted testimony", by the Government's attorney.

The decision of the Court below, condoning the prosecutor's closing argument statement on six separate occasions that the Government's case is uncontradicted or uncontroverted, is in complete conflict with numerous circuits, the cases in the First Circuit being, *United States v. Flannery*, 451 F.2d 880 (1971); *Desmond v. United States*, 345 F.2d 225; *Rodriguez-Sandoval v. United States*, 409 F.2d 529, the Seventh Circuit, *United States v. Handman*, 447 F.2d 853 and a case in the Tenth Circuit, *Doty v. United States*, 416 F.2d 887, which holds that such comment is prejudicial and in violation of the Fifth Amendment and the following Circuits which have held to the contrary, *Rosch v. Kelly*, 527 F.2d 871, the Fifth Circuit; *United States v. Rodriguez*, 545 F.2d 829, Second Circuit; *United States v. Jenkin*, 544 F.2d 180 Fourth Circuit; *United States v. Bartemio*, 547 F.2d 341, Seventh Circuit.

To add to the confusion there is an opinion by Justice Roberts of the Pennsylvania Supreme Court in *Commonwealth v. Davis*, 452 Pa. 171, wherein, after reviewing all the Federal law on the subject, decided that such comments were in violation of the Fifth Amendment.

The six statements by the prosecutor that the Government's evidence was uncontradicted are as follows:

> "What he told us in that regard to Churchill is contradicted in no way. (N.T. 729).
>
> Consider the fact that a chemist testified uncontraverted. (N.T. 740). It is uncontraverted that Exhibits G-8, G-10 are amphetamines. (N.T. 742).
>
> I began this closing argument to you saying that there has not been contraverted fact; there has not been one contradiction.
>
> Objection Your Honor
>
> The Court: Sustain the objection (N.T. 745)
> . . .
>
> . . . Show that what he told us and what I am going to go over is not in any way contradicted.
>
> Mr. Madonick: That is objected to and I move for a Mistrial.

> The Court: Sustain your objection, motion denied for a Mistrial.
>
> The Court: Do not use the term 'contradict' anymore."(N.T. 746).

II.

The Government's closing address was prejudicial.

The prosecutor, in his closing address stated:

> "Mr. Kanner directly challenged the Government to address this issue. He brought to the jury's attention that Mr. Mayer said as he did under oath, that he couldn't swear to the fact that they were manufacturing amphetamine. Very tricky question, very clever way to bring it to the jury. Of course."
>
> "Mr. Kanner: Your Honor I certainly must object to that. There is nothing tricky about a man's. . ."
>
> "Mr. Muller: I will strike the word 'trickey' "
>
> "The Court: He has agreed to strike the word 'tricky'. I have cautioned you make an objection and make no speeches, Mr. Kanner."
>
> "Mr. Kanner: I am sorry."

> "Mr. Mullen: I will strike the word 'tricky' and I will use the word 'artful', because indeed that is what it is artful; a very artful crossexamination, a very artful closing to the jury" (NT836).

It needs very little argument to sustain the objection of being prejudicial when the United States Attorney stated that counsel for the defendant, Robinson, threw a tricky question at the Government's chief witness Mayer, by proposing to him that he couldn't swear as to what was being manufactured.

Then when that was objected to the Court cut counsel off on making a motion for a mistrial by stating "He has removed the word 'tricky'."

III.

The rulings of the trial judge violated due process and denied the petitioner a fair trial.

(a) Petitioner requested trial judge to charge as follows:

> "The Defendant, William Robinson has pleaded 'not guilty' to all charges. The plea acts as a denial of those charges" (which was denied)

This is in complete violation of *United States v. Deangelo,* 138 F.2d 466 (3rd Cir. 1943).

The matters immediately following show there were so many trial errors as to amount to a violation of due process in

that the petitioner did not have a fair trial: *Townsend v. Burke,* 344 U.S. 736; *United States ex rel. Smith v. Baldi,* 344 U.S. 561; *Brown v. Allen,* 344 U.S. 443; *Speller v. Allen,* 344 U.S. 443; *Daniels v. Allen,* 344 U.S. 443; *Watts v. Indiana,* 338 U.S. 49; *Turner v. Pennsylvania,* 338 U.S. 62; *Harris v. South Carolina,* 338 U.S. 68; *Chambers v. Florida,* 309 U.S. 227; *Commonwealth ex rel. Sheeler v. Burke,* 367 Pa. 152, 79 A.2d 654; *Powell v. Alabama,* 287 U.S. 45; *Jackson v. Denno,* 378 U.S. 368; *In Re Murchison,* 349 U.S. 133.

(b) The trial judge erred in admitting the testimony of a young witness who showed no comprehension of the purpose of an oath.

(c) The trial judge directed counsel not to argue to the jury that one of the defendants was acquitted at the close of the Government's case because of faulty identification of the Government's immunized witness.

(d) The trial judge refused to grant a motion for acquittal.

(e) A number of large bottles found in a barn which a Government witness stated he burned and destroyed, was mysteriously produced by the Government agent and permitted in evidence, although one of the conspirators, who was a tenant, abandoned the said barn a year prior to the discovery. This smacks of perjury.

(f) The trial judge refused to consider unfavorable newspaper publicity which the jury might have had access to during their adjournment over the weekend and temporary discharge, prior to resuming deliberations.

IV.

The trial judge erred in admitting the testimony of a young witness who showed no comprehension of the purpose of an oath.

Richard Shoemaker was called as a witness and the Court preliminarily examined him because of his youth (NT548) and he was asked the following questions by the Court.

> "Question: Richard, the Court Officer has just administered an oath to you. Do you understand what it means to take an oath?
>
> Answer: Yes.
>
> Question: Do you understand what it means to tell the truth?
>
> Answer: Yes.
>
> Question: And do you know what happens to people who don't tell the truth?
>
> Answer: No.
>
> Question: Why is it important to tell the truth?
>
> Answer: Because if you were lying then —

> Question: Richard, would you mind standing up so I can see you a little better and you will also be able to talk into the microphone a little better? Why is it important to tell the truth?
>
> Answer: Because then you would be lying.
>
> Question: And what is bad about lying?
>
> Answer: That — (pause)
>
> Question: What happens to people that tell lies?
>
> Answer: They get in trouble.
>
> Question: What kind of trouble? Do you know what kind of trouble people get into?
>
> Answer: No.
>
> (N.T. 549) Question: Do you have any idea how important it is when you walk into a Courtroom and you raise your hand and you swear to tell the truth?
>
> Answer: Yes. If when you do that then you have to tell the truth.
>
> Question: Why do you have to tell the truth when you raise your hand in a Courtroom?

Answer: (no response)

Question: Let's take something else, Richard. How old are you?

Answer: Ten.

Question: What grade are you in school?

Answer: Fifth.

Question: And do you go to Church?

Answer: Yes.

Question: What church do you go to?

Answer: Assumption.

Question: What do they teach you in church about telling the truth?

Answer: Let's see, if you don't tell the truth, you get into a lot of trouble.

Question: Yes. Do you get into a lot of trouble with just the law, or do you get into a lot of trouble with somebody else?

Answer: You get in trouble with other people when you lie to them because then they

don't know what — like if they ask you if you are in trouble and they ask you what happened, if you told a lie then it wouldn't be right and they wouldn't know what to do.

Question: How about getting in trouble with God if you tell lies?

Answer: You would be sinning.

The Court: All right. O.K. Any other questions you wish to ask?

By Mr. Kanner (N.T. 550)

Question: Son, you don't know really what happens if you tell a lie, is that correct?

Answer: (witness, nodding head in the affirmative)

The Court: Yes he does know or yes he doesn't know. I'm having trouble understanding your question. I am not sure this young man does. Would you rephrase the question?

Mr. Kanner: Will you read back the question he answered.

The Court: You told me what his answer was I wasn't even looking at him (whereupon the question was read back).

Answer: Yes.

The Court: Yes you don't know what happens when you tell a lie?

Witness: (Nodding head in the affirmative)

The Court: All right any other questions?

Mr. Mullen: No questions Judge.

The Court: I find that this witness is competent. He answers as intelligently and as coherently as most witnesses do.

Mr. Kanner: May we have an exception to Your Honor's ruling.

Under Federal Rules of Evidence 601 the competency of a witness is determined by State law and in this case, Pennsylvania.

In almost an analogous situation, the Superior Court of Pennsylvania in *Commonwealth v. Reimmel,* 221 Pa. Sup. 84, held that a witness was not competent.

The colloquy in the *Reimmel* case is as follows:

The Court: All right. Do you know that you are supposed to tell the truth?

Witness: Yes.

The Court: Do you tell the truth all the time?

Witness: Yes.

The Court: Linda, do you know that you are supposed to tell the truth all the time?

Witness: Yes.

The Court: Do you try to tell the truth all the time?

Witness: Yes.

The Court: Do you know what it means to take an oath and raise your hand to God? Do you know what that means?

Witness: No.

The Court: O.K. Well that means you are asking God to witness that you are telling the truth. You are asking God to be the one who sees that you tell the truth. Do you understand that?

Witness: Yes.

The Court: O.K. What happens?

Witness: You get beaten.

The Court: O.K. You mean your mother or teacher gives you a beating?

Witness: Yes.

The Court: Do you know it is wrong to tell a lie?

Witness: No.

The Court: Well you don't? Do you tell lies? Do you understand my questions? That's all right, you're among friends. We are all friends. I told you I have a girl like you. Do you try to tell the truth all the time?

Witness: Yes."

The Superior Court held that it was error to admit the testimony of the said witness. The witness showed no comprehension of the purpose of an oath and that Devine punishment is implied. The fact that the trial judge offered an explanation and received an affirmative response is not sufficient to demonstrate the comprehension the law requires of a witness.

This aptly is demonstrated when the boy testified as to material facts. He testified to somebody (Agent Miller told him to use the word "chemicals"). We quote from the record (NT562):

"Son, it is not true that this man (pointing) brought you into this courtroom and asked you whether or not this motor and these things were in the barn. Do you remember that this morning.

Answer: Yes.

Question: He asked you that and he pointed them out to you didn't he?

Answer: Yes.

Son, you don't know what chemicals are; somebody told you about chemicals, is that right?

Answer: Yes."

(NT563) This is a clear demonstration of the misconduct of the agent in charge in getting this young lad prior to Court convening and suggesting and pointing these items out to him and suggesting the word "chemicals." But aside from that, it aptly demonstrates that this young lad did not understand the obligation to tell the truth.

V.

The trial judge directed counsel not to argue to the jury that one of the defendants was acquitted at the close of the Government's case because of faulty identification of the Government's immunized witness.

When the chief Government's witness, Mayer, was being cross-examined as to the penalty that he faced prior to receiving a new hearing, the Court restricted counsel by getting into the penalties unless he had specific evidence to sustain his questions. The Court advised counsel that the jury was not to be told the penalty that is involved upon commission of the crimes charged against defendant Robinson.

Counsel for the defendant had a right to ask him whether he was advised of what penalty he would face upon his conviction. However, he knew what the penalty was because that it goes to his credibility because he had already proved that this man has served a jail sentence of some eight years for a robbery but the Court refused to permit counsel to proceed along these lines in his cross-examination (NT318-319).

After the Court at the close of the Government's case granted that a motion to dismiss as to one of the defendants Gentile, he cautioned all counsel not to mention or argue this to the jury. We quote from the record (NT733) Mr. Mullen's address to the jury:

> "With regard to the conspiracy count, it charges BILL ROBINSON, LUKE ROBINSON,

> JOSEPH ANTONIEWICS, STANLEY PALMER, JOHN DRUM and JOSEPH GENTILE, who is no longer with the case. Let me speak to that now."

Mr. Bill Mayer, using even simple mathematics (NT 734):

> "The Court: Excuse me Mr. Mullen, I have told the jury they are not to speculate why.
>
> Mr. Mullen: Fine. O.K. We won't get into that at all, Thank you.
>
> The Court: That's correct."

It is fundamental that a defendant has a right to be heard by himself and his counsel and to take away from counsel the argument that Mr. Mayer was even incorrect as to the one defendant where no testimony was produced. Although recently through being the Government's witness as to the conspiracy in this case included Gentile.

VI.

Refusal to grant motion for judgment of acquittal.

The Government's case rises and falls on the testimony of William Mayer.

He flatly said on cross-examination (NT317) that he wouldn't want to swear what was being made. We quote from the record:

"Question: Mr. Mayer, I gather from a portion of your rather voluminous testimony that you wouldn't want to swear what anybody, regardless of who they were, were specifically making, is that correct?

Answer: The only answer that I can give you is what they told me they were making.

Question: I didn't ask you that. Answer the question, please.

Answer: No I can't."

The only other testimony was that of a chemist, Robert Henderson who stated as to Exhibit G-4 which is a mirror, which was given to Agent Miller by Mayer long after the alleged manufacturing conspiracy existed and he concluded that it contained traces of amphetamine. This falls far short from the proof that defendants sold and manufactured amphetamine. There is no proof of what was manufactured by the defendant at any place in this case. The chemist further testified there were 28.35 grams in an ounce (NT508). He admitted that the amount was less than one-ten thousandth of a gram (NT510). He admitted it was so small he didn't try to measure it. He also testified that articles found in a barn contained traces of amphetamine. The articles given to him were about a year after the defendants moved from the said barn. These exhibits were never identified by Mr. Mayer as being in the barn at the time that Antoniewicz, one of the defendants, had possession of same.

These exhibits should not have been admitted because of a complete hiatus of over eleven months when one of the defendants was supposedly there and the Government failed to prove non-access to the said premises.

To summarize no amphetamine was found in the possession, custody, control or dominion of any of the defendants in this case.

All of the evidence in the barn according to the testimony of the Government's witness Gentile (NT574, 575 and 576) indicates that there was quite some chemicals a lot of chemicals and had some foul smelling odors and he kept horses in the barn so he threw everything out. He never kept any of the articles in the barn and threw it all out. Gentile further testified (NT572) that he moved into the said barn in September 1975 and lived there for six months. This was long prior to the time when Agent Miller went to the barn and testified as to what he found.

If Gentile threw all the junk out, how could there be any exhibit of amphetamine in the said barn when Miller received the flask. Obviously the said article must have been put there, either by Miller or Mayer.

VII.

A number of large bottles found in a barn which a Government witness stated he burned and destroyed, was mysteriously produced by the Government agent and permitted in evidence, although one of the conspirators, who was a tenant, abandoned the said barn a year prior to the discovery. This smacks of perjury.

The Government proved that one of the defendants, Antoniewicz, lived in the house which also contained the barn. Mr. Mayer testified when he saw him at the barn, he noticed some chemicals there and bottles and flasks, etc. but he never identified them at the trial as being the same ones which he saw when he originally went there. As a matter of fact, he never identified these articles which Miller found at the barn in February of 1976 at all.

Mr. Antoniewicz, one of the defendants, had vacated the property some eleven months prior to February of 1976. The Court recognized a problem as to the exhibits at the barn. We quote (NT525):

> "The Court: It is my present impression, and (N.T. 526) I have already so ruled, that I cannot permit the jury to speculate as to the Exhibits from Trevose in light of the time gap in the failure to connect these defendants to those Exhibits. However, I am always prepared to be educated."

The Government tried to close this hiatus of eleven months by first calling Richard Shoemaker (NT548) and although his testimony should not have been admitted because he was incompetent and didn't understand the values of an oath, which has been previously argued, he admitted on cross-examination (NT561) that the chemicals and exhibits were pointed out to him by Agent Miller prior to Court convening and he was told about chemicals by the said agent (NT562, 563). The Government then called the father, George Shoemaker (NT563) who admitted (NT568) that he would have no reason to mark down or observe what movements there were or were not in the particular adjacent property.

It was further developed that this man worked every day at Rising Sun and Adams Avenue, approximately fifteen miles from the barn from 8:00 a.m. until 4:20 p.m.

The law is clear that to show constructive possession, the Government must prove, beyond a reasonable doubt, that the defendant was in a position to exercise dominion over or control over the items, *United States v. Holland,* 445 F.2d 701 to the same effect, *Jackson v. United States,* 250 F.2d 772.

VIII.

The trial judge refused to consider unfavorable newspaper publicity which the jury might have had access to during their adjournment over the weekend and temporary discharge, prior to resuming deliberations.

The jury was given this case on Friday, December 3, 1976 and the Court advised them to start deliberations and after about an hour and a half, the Court discharged the jury to commence deliberations again on Monday, December 6, 1976.

On December 3, 1976 in accordance with the affidavit attached, the Bucks County Courier Times, which is an evening newspaper and the main newspaper in Bucks County, having an average circulation of 60,000 daily, in Section "B" published a two column report of the entire case with a heading in large print MAN ACQUITTED OF DRUG CHARGE. It gave an outline of the entire matter of the proceedings of this trial and in the second column of the said article, we find: "After ordering Joe Gentile's acquittal yesterday, Judge Luongo turned to the defendant and said, 'You're excused, Don't do it again.' The jury was not present at that time."

The Court records as to the composition of the jury will indicate that Florence Dinatio lived in Bucks County.

The question then arises whether she became aware of it and communicated the said fact to the other jurors on Monday morning when they resumed their deliberations.

The key to this is if there is a possibility of prejudice, it must be assumed. In *United States v. Ogden,* 105 F. 371 (1900) the Court held that the defendant convicted in a criminal case is entitled to a new trial where it is shown that some of the jurors read an article in a newspaper before the case was submitted to the jury where the jury found the defendant guilty because the article contained other prejudicial statements that would not be admissable.

In *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. E.D. 2d 600, we find that prejudicial publicity is a violation of due process of the Fourteenth Amendment to the Constitution.

In *Estes v. Texas,* 381 U.S. 552, 14 L. E.D. 2d 118, holds that it's not only a violation of the Fourteenth Amendment but also of the Sixth Amendment which applies to the Federal Courts, and on page 550, we find: "That our system of law has always endeavored to prevent even the probability of *unfairness.* To perform its high function in the best way, justice must satisfy the appearance of justice."

These two cases hold that the possibility of prejudice is sufficient to consider the statement as prejudicial.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ David Kanner
Attorney for Petitioner

APPENDIX A — OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

WILLIAM ROBINSON

CRIMINAL NO. 76-392-1

Filed
Jan. 13, 1977
John J. Harding, Clerk

ORDER

This 13th day of January, 1977, upon consideration of Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and, in the Alternative, for a New Trial and the Government's Response thereto, and after oral argument and upon consideration of the Memorandum of Law submitted by Defendant, for the reasons stated in open court at the time of oral argument, it is

ORDERED that the Motion is DENIED.

s/ Alfred L. Luongo
J.

APPENDIX B — OPINION OF THIRD CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1175

UNITED STATES OF AMERICA,

v.

WILLIAM ROBINSON,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
Crim. No. 76-392-1

Submitted Under Third Circuit Rule 12(6)
June 17, 1977

Before: ADAMS, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised appellant, namely, whether (1) the district court erred by finding witness Shoemaker to be competent; (2) the district court erred by

restricting cross-examination and closing arguments; (3) the district court erred by refusing to give an instruction that was requested by appellant; (4) the district court erred by denying a motion for acquittal; (5) the district court erred by permitting testimony as to chemicals found in the barn at Trevose; and (6) the district court erred by refusing to receive after-discovered evidence, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ (illegible)

Circuit Judge

Supreme Court, U. S.
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No. 77-67

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 17, 1977. The petition for a writ of certiorari was filed on July 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether references in the government's closing argument to the fact that the testimony of prosecution witnesses had not been contradicted constituted impermissible comment upon petitioner's failure to testify at trial.

2. Whether the prosecutor's statement in closing argument that defense cross-examination of a government witness had been "tricky" warranted a mistrial, where the prosecutor immediately agreed to strike the word "tricky."

3. Whether the district court erred in refusing to grant petitioner's request that the court instruct the jury that a plea of not guilty is a denial of the charges.

4. Whether the district court erred in admitting the testimony of a ten-year-old boy.

5. Whether the district court erred in directing counsel not to mention to the jury the fact that a co-defendant's motion for a judgment of acquittal had been granted.

6. Whether the district court erred in denying petitioner's motion for a judgment of acquittal.

7. Whether chemicals and laboratory equipment found in a barn that a co-defendant had leased were properly introduced into evidence.

8. Whether petitioner was prejudiced by a newspaper article appearing in a neighboring county that reported the granting of a co-defendant's motion for a judgment of acquittal.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of manufacturing amphetamine, in violation of 21 U.S.C. 841, one count of possession of amphetamine with intent to distribute it, in violation of 21 U.S.C. 841, and one count of conspiracy to commit the foregoing offenses, in violation of 21 U.S.C.

846. He was sentenced to three concurrent terms of three years' imprisonment, to be followed by three concurrent terms of three years' special parole.[1] The court of appeals affirmed (Pet. App. B).

The evidence at trial showed that in February 1975 petitioner became involved in an enterprise that manufactured and sold amphetamine ("speed") at a laboratory at 4217 Main Street in Philadelphia. This enterprise had been started in 1974 by petitioner's son and co-defendant, Luke Robinson, and co-defendant Joseph Antoniewicz. In November 1974, Luke Robinson went to see his wife's uncle, William Mayer, who was the president of M.B. Corporation and the principal government witness at trial. Robinson informed Mayer that he and Antoniewicz were experimenting in the manufacture of speed and showed him the equipment they were using in the basement of a house in Churchville, Pennsylvania, which Robinson was leasing, and in a barn in Trevose, Pennsylvania, which Antoniewicz was leasing (Tr. 225-233). Robinson offered Mayer $500 per pound of speed manufactured in exchange for Mayer's purchasing of the required chemicals through the M.B. Corporation. Mayer accepted this offer, and it was subsequently agreed that

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[1]Co-defendants Luke Robinson (petitioner's son) and Joseph Antoniewicz were convicted on the conspiracy count, two counts of manufacturing amphetamine, and two counts of possessing amphetamine with the intent to distribute it. Co-defendant Stanley Palmer was convicted on the conspiracy count and acquitted on one count of manufacturing amphetamine and one count of possession of amphetamine with the intent to distribute it. Co-defendant John Drum was acquitted on the conspiracy count, one count of manufacturing amphetamine, and one count of possession of amphetamine with the intent to distribute it. Co-defendant Joseph Gentile's motion for a judgment of acquittal was granted by the court at the close of the government's case.

Robinson and Antoniewicz would move their equipment to Mayer's office at 4217 Main Street (Tr. 234-236). In the months that followed, several pounds of speed were manufactured at 4217 Main Street and sold for $4,500 per pound (Tr. 243-245, 248).[2]

In February 1975, Mayer and Luke Robinson had a disagreement and Mayer ordered that the business be discontinued. Petitioner, however, persuaded Mayer to permit him to run the business on a temporary basis, without Luke Robinson, to make enough money to pay their bills (Tr. 285-286). Shortly thereafter, petitioner brought in co-defendant Stanley Palmer to work in the laboratory, and subsequently he hired co-defendant John Drum to replace Antoniewicz, who had quit (Tr. 287, 289-290). In April 1975, the laboratory was closed down, and a month or two later Luke Robinson, Palmer, and petitioner moved their equipment out of Mayer's office (Tr. 291-292).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that in his closing argument the prosecutor improperly referred to the fact that government evidence had not been contradicted.[3] He argues that the prosecutor's observations constituted impermissible comment upon petitioner's failure to testify at trial.

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[2]Traces of amphetamine were found on a mirror in the laboratory in Mayer's office (Gov't Ex. 4; Tr. 41, 501) and in laboratory equipment found in the barn in Trevose (Gov't Exs. 8, 9, 10, 12; Tr. 49-54, 589).

[3]Petitioner complains of the following comments:

> * * * Mr. Bill Mayer tells Agent Miller about Churchville and about a fellow who lived in Churchville, and about things that he saw in Churchville, and about the time that he went there and saw these things and he placed the time between the last part of November, first part of December of '74 — '75 — '74 actually going on '75. It fit perfectly, the time spectrum that Mr. Micchichi testified to Luke Robinson living there in Churchville * * *. The point is, Mr. Mayer, what he told the Federal authorities after he was given immunity was right on the money. What he told us in that regard to Churchville is contradicted in no way. [Tr. 728-729.]
>
> * * * * *
>
> Consider the fact the chemist testified, uncontroverted. Defense chemist did not even examine these exhibits. It is uncontroverted that Exhibits G-8 and G-10 are amphetamines. [Tr. 740.]
>
> * * * * *
>
> I began this closing argument to you saying that there has not been a controverted fact, there has not been one contradiction. [Tr. 742.]
>
> * * * * *
>
> The fact of the matter is, [Mayer] was on that witness stand for several hours cross-examined by six lawyers. And again the Government argues to you the evidence that is now in the record shows that what he told us and what I am now going to go over is not in any way contradicted. [Tr. 745.]

[4]In *Griffin*, the prosecutor stated to the jury that the defendant "has not seen fit to take the stand and deny or explain" the prosecution's evidence (380 U.S. at 611). Moreover, the trial court advised the jury that it could take into consideration the defendant's failure to take the stand to explain evidence of facts within his knowledge (*id.* at 610).

Although a prosecutor may not comment directly upon a defendant's failure to testify at trial (*Griffin* v. *California*, 380 U.S. 609),[4] not every reference to the absence of defense evidence constitutes such a comment. The privilege against compulsory self-incrimination is violated only if the comment would naturally and necessarily be viewed by the jury as a comment on the failure of the defendant to testify. *E.g.*, *United States* v. *Williams*, 521 F. 2d 950, 953 (C.A.D.C.); *United States* v. *Williams*, 503 F. 2d 480, 484-485 (C.A. 8); *United States ex rel. D'Ambrosio* v. *Fay*, 349

F. 2d 957, 961 (C.A. 2), certiorari denied *sub nom. D'Ambrosio* v. *Fay*, 382 U.S. 921. It has uniformly been held that reference to the fact that prosecution evidence has not been contradicted does not naturally and necessarily refer to the defendant's failure to testify unless evidence contradicting the government's case could logically have come only from the defendant himself. See, *e.g.*, *United States* v. *Estrada de Castillo*, 549 F. 2d 583 (C.A. 9); *United States* v. *Bartemio*, 547 F. 2d 341 (C.A. 7); *United States* v. *Rodriguez*, 545 F. 2d 829 (C.A. 2); *United States* v. *Bishop*, 534 F. 2d 214 (C.A. 10).

In this case, the comment referring to the testimony of the government's chemist obviously does not pertain to the defendant's failure to testify; the chemical composition of the government's exhibits would normally be shown by expert testimony. The remaining comments pertain to the testimony of William Mayer, a co-conspirator; the prosecutor was arguing in support of Mayer's credibility by showing that, while his testimony had been corroborated with other evidence, it had not been contradicted. Although the defendant was in a position to contradict much of Mayer's testimony, he was by no means the only person who may have been able to do so. Mayer's account of the speed manufacturing enterprise of which petitioner became part could have been contradicted with evidence from Mayer's other employees or from the owners or subsequent tenants of the house in Churchville or the barn in Trevose. Thus, there is no reason to believe that the jury understood the remarks as comments upon petitioner's failure to testify[5] See *United States* v. *Jenkins*, 544 F. 2d 180 (C.A. 4).

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[5]There is no conflict among circuits on this issue. The cases cited by petitioner (Pet. 5), in which a prosecutor's reference to uncontradicted government evidence was held to be improper, are distinguishable from this case. In *United States* v. *Flannery*, 451 F. 2d 880 (C.A. 1); *United States* v. *Handman*, 447 F. 2d 853 (C.A. 7); *United States* v. *Rodriguez-Sandoval*, 409 F. 2d 529 (C.A. 1), certiorari denied, 414 U.S. 869; and *Desmond* v. *United States*, 345 F. 2d 225 (C.A. 1), the witness whose testimony was described as "uncontradicted" had testified to a private transaction or conversation with the defendant. In the circumstances of each of the cases, the court concluded that the jury must have understood that the defendant was the only person who could have rebutted the "uncontradicted" testimony. In *Doty* v. *United States*, 416 F. 2d 887 (C.A. 10), the prosecutor had expressly conceded that, as to two defendants who had testified, the government's case was contradicted. His subsequent comment that, as to the other defendants, the evidence was not contradicted was therefore clearly a comment upon the failure of those defendants to take the witness stand.

2. Petitioner contends (Pet. 7-8) that a mistrial should have been declared when the prosecutor in his closing argument referred to defense cross-examination of a government witness as "tricky." Immediately following petitioner's objection to this portion of closing argument, the prosecutor apologized and agreed to strike the word "tricky" (see Pet. 7). Petitioner has not shown how, under these circumstances, he was prejudiced by the prosecutor's initial choice of terms. See *Sawyer* v. *United States*, 202 U.S. 150.

3. Petitioner argues (Pet. 8) that the district court erred in refusing to instruct the jury that a plea of not guilty is a denial of the charges. He cites no authority holding that such an instruction must be given,[6] and we know of none. The court instructed the jury at some length that the government bore the burden of proving all elements of the crimes charged beyond a reasonable doubt and that

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[6]*United States* v. *DeAngelo*, 138 F. 2d 466 (C.A. 3), cited by petitioner, did not involve the question whether a defendant was entitled to have the jury instructed that a plea of not guilty is a denial of the charges. There, the question was whether, in a conspiracy prosecution, the government was precluded from relitigating factual issues determined favorably to the accused in a prior prosecution

the defendants had no obligation to prove their innocence (Tr. 856-857, 859, 861). Reading the charge as a whole, the jury could not possibly have entertained any doubt that petitioner was contesting each element of the charges against him.

4. Petitioner contends (Pet. 10-17) that the district court should not have admitted the testimony of Richard Shoemaker, a ten-year-old boy.[7] Contrary to petitioner's assertion (Pet. 14), the competency of a witness in a federal criminal trial is governed by federal, not state, standards.[8] Under Rule 601, Fed. R. Evid., all persons are competent to testify subject only to the exceptions set forth in the Federal Rules of Evidence. The Rules contain no provision for the exclusion of the testimony of children. Accordingly, children are normally competent to be witnesses; their youth, intelligence, and ability to communicate are matters bearing upon the weight of their testimony, not its admissibility.

The district court questioned Richard Shoemaker extensively as to his understanding of the importance of testifying truthfully (Pet. 10-14). Based upon the answers to those questions, it was well within the district court's

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for a substantive offense related to the conspiracy. In the course of its discussion, the court of appeals observed (138 F. 2d at 469) that "appellant's plea of not guilty to the indictment [in the first prosecution] had there put in issue every material allegation of fact contained in the indictment."

[7]Shoemaker lived next door to the barn in Trevose that Antoniewicz had leased in late 1974 and early 1975. He testified that in the summer of 1975, he had observed chemical bottles and jars in the barn.

[8]Rule 601, Fed. R. Evid., provides that the competency of witnesses shall be governed by state law only "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision * * *."

discretion to permit Shoemaker to testify.[9] See *United States* v. *Hardin*, 443 F. 2d 735 (C.A.D.C.).

5. Petitioner argues (Pet. 18-19) that the district court improperly instructed counsel not to mention to the jury that co-defendant Gentile's motion for a judgment of acquittal had been granted. Prior to closing arguments, the court instructed the jury (Tr. 722-723) that Gentile was no longer involved in the case and that they should not "speculate as to why." Petitioner did not object to this instruction, and he did not object when the court prevented the prosecutor from discussing Gentile's acquittal in his closing argument (Tr. 733-734; Pet. 18-19). Nor did petitioner's counsel at any time indicate any desire to discuss Gentile's acquittal in his closing argument.

Since petitioner did not raise this issue in the district court, he should not be heard to do so now. (See, *e.g.*, *Tacon* v. *Arizona*, 410 U.S. 351.) In any event, the court's ruling was correct. Gentile's acquittal was based upon William Mayer's inability to identify him at trial (Tr. 617-618). The acquittal thus was wholly unrelated to the government's case against petitioner. Any attempt by petitioner to make use of the acquittal could only have confused the factual issues at trial and generated unfair prejudice against the government. The district court acted well within the scope of its discretion over such matters in instructing counsel to avoid mention of Gentile's acquittal. See *United States* v. *Masterson*, 529 F. 2d 30, 32 (C.A. 9), certiorari denied, 426 U.S. 908.

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[9]Shoemaker indicated that those who lie "get in' trouble" (see Pet. 11) and that lying is "sinning" (see Pet. 13). The fact that in response to defense counsel's questions he was unable to say specifically "really what happens if you tell a lie" (Pet. 13-14) shows very little. Indeed, it would have been difficult for most adults to state the consequences of lying with the specificity petitioner would require, since those consequences vary greatly depending upon circumstances.

6. Petitioner contends (Pet. 19-21) that the district court erred in denying his motion for a judgment of acquittal. He argues that the government failed to prove that the substance manufactured by petitioner and his co-defendants was amphetamine. But William Mayer testified that Luke Robinson told him that the substance they were producing was speed (amphetamine). The government also introduced expert testimony that amphetamine was present in laboratory containers found in the barn in Trevose and on a mirror in the room used as a laboratory in Mayer's office. Finally, Mayer testified that he participated in sales of the substance manufactured for $4,500 per pound. This evidence was more than sufficient to permit the jury reasonably to conclude that the substance produced was amphetamine.

7. Petitioner argues (Pet. 22-23) that the district court erred in admitting into evidence laboratory equipment and amphetamine found on February 17, 1976, in the barn in Trevose because there was no indication that co-defendant Antoniewicz, who had leased the barn but who had vacated the premises at the end of March 1975 (Tr. 448), had left these items. But Richard Shoemaker, who lived next door to the barn, testified that in the summer of 1975 he observed chemical bottles and jars in the barn (Tr. 556-558), and Richard's father, George Shoemaker, testified that there had been no activity in the barn while the premises were vacant in the spring and summer of 1975 (Tr. 566-567). Anthony Gentile, who moved onto the premises in September 1975, testified that he had found in the barn "various kinds of chemistry equipment, bottles [and] jars," some of which contained "foul smelling chemicals" (Tr. 573). Thus, it could fairly be inferred that the equipment found in the barn in February 1976 had been left there by Antoniewicz, and the evidence was

properly submitted to the jury for an assessment of its weight.[10]

8. Petitioner contends (Pet. 24-25) that he may have been prejudiced by a newspaper article reporting the granting of co-defendant Gentile's motion for a judgment of acquittal, which appeared in a Bucks County newspaper during the weekend of December 4-5, 1976, in the midst of the jury's deliberations. His claim is based upon the fact that one of the jurors was a resident of Bucks County. On the afternoon of Friday, December 3, however, the district judge instructed the jurors not to discuss the case over the weekend (Tr. 887), and prior to trial the court instructed the jurors not to read or listen to any accounts of the trial (Tr. 8). On Monday morning, December 6, the court asked the jurors whether they had read anything about the trial during the weekend, and no juror responded affirmatively (Tr. 892). At that time petitioner expressed no dissatisfaction with the measures taken by the court to insure that none of the jurors had seen or heard about the article, and he does not now offer any reasons for believing that the action taken by the district court was inadequate. In any event, the district court's measures to insure that the jurors had not been affected by publicity were appropriate under the circumstances. See, *e.g.*, *United States* v. *Hankish*, 502 F. 2d 71, 76-77 (C.A. 4).

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[10]Contrary to petitioner's assertion (Pet. 21), Gentile did not testify that, in cleaning out the barn when he moved onto the premises, he had thrown out all of the laboratory equipment. Rather, Gentile said that he had discarded "a lot of" the equipment he had found in the barn (Tr. 573).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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